In the Supreme Court of the United States

OCTOBER TERM, 1970

70-250

No. ~~1794~~

ROBERT B. CARLESON, et al.,
Appellants,

vs.

NANCY REMILLARD, et al.,
Appellees.

On Appeal From the United States District Court
for the Northern District of California

Jurisdictional Statement

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Appellants Robert B. Carleson, Director of the California Department of Social Welfare; and Robert Jornlin, Director, Lois Lee, Social Worker, Susan Giordano, Social Worker, Helen Kornguth, Eligibility Worker, John Gibson, Social Worker Supervisor, all of the Contra Costa County (California) Department of Social Services, appeal from the Order Granting Declaratory Judgment and Injunctive Relief issued on March 31, 1971, by the specially constituted three-judge United States District Court for the Northern District of California. This Statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The Opinion and Order of the United States District Court are not reported. Copies of the majority and dissenting opinions are attached hereto as Appendix A. A copy of the Order Granting Stay of Execution of Order Granting Injunctive Relief is attached hereto as Appendix B.

JURISDICTION

This suit was brought in the United States District Court for the Northern District of California by appellees on behalf of themselves and all others similarly situated for declaratory and injunctive relief pursuant to Title 28, United States Code sections 2201 and 2202 and Title 42, United States Code section 1983. Jurisdiction of the District Court was invoked pursuant to Title 28, United States Code section 1343(3). Appellees sought a declaration that California Department of Social Welfare Regulation EAS section 42-350.11 is in violation of the Social Security Act (42 U.S.C. §§ 601-609) and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Since appellees sought an injunction against the enforcement of Regulation EAS section 42-350.11, a regulation of statewide applicability, a three-judge court was convened pursuant to the authority and requirements of Title 28, United States Code sections 2281 and 2284.

The District Court Order Granting Declaratory Judgment and Injunctive Relief was entered on March 31, 1971 and appellants' Notice of Appeal to this Court was filed in the United States District Court for the Northern California on April 7, 1971. A copy of the Notice of Appeal is attached hereto as Appendix C.

The jurisdiction of the Supreme Court of the United States on this direct appeal is conferred by Title 28, United States Code sections 1253 and 2101(b).

STATUTES INVOLVED

The statutes and regulations involved are Title 42, United States Code sections 601, 602(a)(10), and 606(a); United States Department of Health, Education and Welfare, "Handbook of Public Assistance Administration," Part IV, section 3422; and California Department of Social Welfare Regulation EAS section 42-350. The text of these statutes and regulations is set forth in Appendix D attached hereto.

QUESTION PRESENTED

Must the Social Security Act and/or the Due Process and Equal Protection Clauses of the Fourteenth Amendment be interpreted as requiring California to grant welfare benefits, under the Aid to Families with Dependent Children program (42 U.S.C. §§ 601-610), to families in which the father is absent from the home in the military service, notwithstanding the longstanding administrative interpretation of the Social Security Act by the United States Department of Health, Education and Welfare that the Act does not require a state to grant aid to such families?

STATEMENT OF THE CASE

Appellee Nancy Remillard is the mother of appellee Karen Marie Remillard, a two-year-old child. Gregory Remillard, the husband of Nancy and father of Karen Marie Remillard, is on active duty in the United States Army, having enlisted therein in May, 1969 and having reenlisted in March 1970 for a five-year term.

In September 1970, appellee Nancy Remillard applied to the Contra Costa County (California) Department of Social Services for assistance for her and her daughter under the Aid to Families with Dependent Children ("AFDC") program (42 U.S.C. §§ 601-10; Cal. Welf. & Inst. Code §§ 11200-488).

Mrs. Remillard's AFDC application was denied on the ground that Mr. Remillard's absence from the home was not a "continued absence" within the meaning of section 406(a) of the Social Security Act [42 U.S.C. § 606(a)]. The actual legal basis for the denial by Contra Costa County was California Department of Social Welfare Regulation EAS § 42-350.11 (see Appendix D, p. A23, *infra*) a regulation of statewide applicability, binding on all California counties (see Cal. Welf. & Inst. Code §§ 10553, 10554, 10600, 10604).

This action was commenced on October 21, 1970, wherein appellees, Mrs. Remillard and her daughter, on behalf of themselves and all others similiarly situated, sought a declaration of the invalidity, and an injunction restraining the enforcement, of EAS § 42-350.11 on the grounds that it was in conflict with the Social Security Act and denied appellees due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

Appellants filed an Answer to the complaint and moved for summary judgment in their favor. Appellees filed a cross-motion for summary judgment. A three-judge court was convened pursuant to Title 28, United States Code sections 2281 and 2284, and heard the cross-motions for summary judgment on February 25, 1971. It was stipulated that the matter could be submitted for a final decision.

On March 31, 1971, the three-judge District Court, over the dissent of one District Judge, issued its Order Granting Declaratory Judgment and Injunctive Relief (Appendix A). It is from this Order which appellants appeal. The District Court unanimously granted appellants' Motion to Stay Injunction Pending Appeal and on April 13, 1971, execution of the injunction order of March 31, 1971, was ordered stayed. (Appendix B.)

THE QUESTIONS ARE SUBSTANTIAL

The State of California participates (see Cal. Welf. & Inst. Code §§ 11200-488) in the Federal government's Aid to Families With Dependent Children ("AFDC") program, which was established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394). While participation by a State in the AFDC program is voluntary, those states, such as California, which do choose to participate must comply with the requirements of federal law [the Social Security Act and implementing regulations of the United States Department of Health, Education and Welfare ("HEW")] in order to be eligible for the receipt of federal funds. *Rosado v. Wyman,* 397 U.S. 397 (1970); *King v. Smith,* 392 U.S. 309 (1968).

Under section 401 of the Social Security Act (42 U.S.C. § 601), provision is made for the granting of assistance to a 'dependent child," who is defined in section 406(a) of the Act as a "needy child . . . who has been deprived of parental support or care by reason of the death, *continued absence from the home,* or physical or mental incapacity of a parent, and who is living with" [42 U.S.C. § 606(a) (Emphasis added)] any one of certain specified relatives.

Additionally, sections 401, 402, 403, and 404 of the Social Security Act (42 U.S.C. §§ 601, 602, 603, 604) require participating states to submit a "State Plan" to the Secretary of HEW for approval, which plans must provide, pursuant to 42 U.S.C. section 602(a)(10), "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

This appeal involves the question of the constitutionality of the provision in the HEW-approved California State

Plan that provides that an otherwise "needy"[1] child is ineligible to receive AFDC benefits if the parental "absence from the home" [42 U.S.C. § 606(a)] is "in connection with . . . active duty in the Armed Services." California Department of Social Welfare Regulation EAS § 42-350.11 (Appendix D, p. A23, *infra*).

The District Court has found the California regulation (EAS § 42-350.11, Appendix D) to be invalid. The court purported not to decide the constitutional issues presented,[2] but noted that "it finds them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California." District Court Opinion, Appendix A, p. A5, *infra*. Thus, the District Court states that it is basing its decision on an interpretation of the Social Security Act which it believes is necessary to avoid reaching supposedly substantial substantive constitutional problems. The error in the District Court's reasoning arises out of the fact that the California regulation comports with the requirements of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Thus there is no necessity or basis for invali-

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1. The determination of whether a child is "needy" is made by the State, which is free to set its own standards. *King v. Smith*, 392 U.S. 309, 318 & n.14. In California, "need" is determined according to State Department of Social Welfare regulations developed pursuant to California Welfare and Institutions Code section 11452. It must be noted, however, that this appeal does not raise any issues concerning California's "need standards." Appellees have not challenged those standards, nor have appellants denied that appellees are "needy."

2. In their Complaint, appellees urged that the California regulation denied them equal protection and due process and they urged a pendant claim that the regulation was invalid under the Supremacy Clause because in conflict with the Social Security Act. The case was extensively briefed and argued on both the constitutional and nonconstitutional issues.

dating the state regulation under the Supremacy Clause to avoid reaching constitutional problems that do not exist. Moreover, the California regulation is valid under the Supremacy Clause; it is in conformity with the Social Security Act and the regulations of HEW.

I. Neither the Social Security Act Nor Hew Regulations Require California to Treat a "Military Orphan" as a "Dependent Child" Eligible to Receive AFDC Benefits.

The Social Security Act requires that aid "be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602(a)(10). Here, the question is whether a child, whose father is away from home on military duty, is an "eligible" child, that is, one who suffers "dependency" which is attributable to the "continued absence" [42 U.S.C. § 606(a) (Appendix D, p. A21, *infra*)] of a father who is away from home on military assignment.

That the father is absent in this situation is clear. However, it is equally clear that there is no "continued absence" within the meaning of the Social Security Act. This is so for reason that "continued absence", as it is used in the Act, connotes a type and degree of social and economic estrangement between parent and child which is not attributable to the situation posed by military service.

This Court previously has had occasion to note that in enacting the Social Security Act, "Congress was deeply concerned with the dire straits in which all needy children in the Nation then found themselves," *King v. Smith,* 392 U.S. 309, 327 (1968), but that "[t]he AFDC program, however, was not designed to aid all needy children." *Id.* at 328. Rather, "[i]t was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.' H. R. Rep. No. 615, 74th Cong., 1st Sess., 10

(1935). This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father . . . .' " *Id.*

Thus, public assistance through AFDC "was intended to provide economic security for children," *Id.* at 329, only in the limited family-situations where the expectation of relative economic security inuring to a child from his parent was destroyed by the death or incapacity of the breadwinner or by some similiar type of substantial intra-familial dissociation, denominated by Congress as a "continued absence." Here, there has been no death or incapacitation of the breadwinner nor a severance of the ties between parent and child of the type to give rise to "dependency" and AFDC eligibility.

HEW's interpretation of the "continued absence" requirement is set forth in section 3422 of Part IV of the Department's "Handbook of Public Assistance Administration" (hereinafter referred to as "Handbook") (see Appendix D; p. A22, *infra*, for text of § 3422). The interpretation is a strict one: the absence must be such as "to interrupt or to terminate the parent's functioning as a provider" and the "duration of the absence precludes counting on the parent's performance of his function." *Id.* As an example of the type of situation falling within its interpretation, HEW cites the case where the father deserts the family and disappears.

The District Court has correctly analyzed the HEW regulation in noting that "[t]he precise definition of 'continued absence' rests with the States," (District Court Opinion, Appendix A, p. A3, *infra*). HEW requires only that within its interpretation(Handbook § 3422.2, *op. cit., supra*) a state "will find it necessary to give consideration to such situations as divorce, ... [etc.], employment away from home, service in the armed forces or other military service, and imprisonment." *Id.*

Thus, HEW permits a state to include or exclude from eligibility, persons in any of the situations identified in its regulation. Federal financial participation is available *if* the state includes within the state's eligibility policies members of any of the categories. HEW, Handbook, § 3422.4. However, the existence of the availability of federal contributions does not impose a requirement that a state define its eligibility policies to the maximum extent of liberality allowed by HEW. A state is free to draw more constricted parameters around its AFDC program than would be allowable in terms of the availability of federal funds. *Alexander v. Swank,* 314 F.Supp. 1082 (D.C.E.D. Ill. 1970), *prob. juris. noted,* 39 U.S.L.W. 3359 (U.S. February 22, 1971); *McClellan v. Shapiro,* 315 F.Supp. 484 (D.C.D. Conn. 1970); and *cf. Wyman v. James,* 400 U.S. 309 (1971). The states, in HEW's view, are limited in this regard only by what is popularly known as "Condition X" —or the "equitable treatment doctrine." See generally, *Welfare's "Condition X,"* 76 Yale L.J. 1222 (1967); Comment, *AFDC Eligibility Requirements Unrelated To Need: The Impact of King v. Smith,* 118 U.Pa.L.Rev. 1219, 1221-25 (1970).

The HEW regulation (§ 3422.2, *op. cit., supra*) provides that a state "will find it necessary to give consideration" to various situations which the state may wish to include or exclude in its AFDC eligibility policy. California has done this, as is manifested in its regulation EAS § 42-350 (Appendix D). Each of the situations noted in the HEW regulation has been "considered" by California and children in each of the groups are considered eligible (EAS §42-350.2) except in three instances (EAS § 42-350.11), *i.e.*, when a parent is absent on "trips made in connection with current or prospective employment," or on "active duty

in the Armed Services." These are obviously three of the situations which HEW notes the state must consider, *i.e.*, situations of "search for employment, employment away from home, service in the armed forces or other military service." Handbook § 3422.2.

However, the District Court has stated that California has improperly interpreted the HEW phrase "will . . . give consideration to . . . ." According to the lower court, California considers each applicant's situation individually in situations of "imprisonment, or temporary medical treatment, or parental separation," with "no across-the-board exclusion of any of these categories," but gives "a different kind of 'consideration' " to the military-service situation by judging the group, as a group, to be ineligible. District Court Opinion, Appendix A, p. A3, *infra*. In this regard, the District Court is in error. California gives consideration to *each* group, *as a group,* listed in the HEW regulation. A child whose father is imprisoned or has been deported or who has deserted the family is treated as eligible to receive AFDC, not because of his individual situation, but because he is a member of the group which has been determined to be eligible. Similarly, the child whose father is looking for work or working away from home or is in the military is deemed ineligible because California has "given consideration" to those situations and adopted a policy of group ineligibility.

Furthermore, contrary to the District Court's determination (Appendix A, p. A3, *infra*), HEW allows, and the decision in *Damico v. California,* No. 46538, (D.C.N.D. Cal. Sept. 12, 1969)[3] does not prohibit, this type of "con-

3. This Court reversed the District Court in *Damico* on the question of exhaustion of state administrative remedies and remanded the matter. *Damico v. California,* 389 U.S. 416 (1967). On remand, the District Court invalidated the statutory and regulatory provisions of California law which imposed a three-month

sideration" and group-eligibility determination. *Damico* held, rather, that California, having "given consideration" to the situation postulated by HEW as "desertion or informal separation" (Handbook § 3422.2), and having decided that children in such situations are eligible to receive AFDC, the State could not then impose an absolute three-month waiting period as a requirement of establishing "deprivation" and eligibility. The problem in *Damico* was not that California had made a group ineligibility determination, as suggested by the District Court here (Appendix A, p. A3, *infra*), but rather, that California was arbitrarily denying aid to children who were part of a group whom California had determined to be eligible. In contrast, here, California has made the determination which HEW allows it to make, that a father's absence on military duty does not, *per se*, give rise to dependency and AFDC eligibility.[4]

As District Judge Conti stated in his dissenting opinion in this case (Appendix A, pp. A15-17, *infra*):

> "It is clear since in Section 3422.2, HEW specifically defers to the states to determine whether as a matter of *state* policy, service in the armed forces will be treated as 'continued absence.' Under Section 3422.4 Federal financial participation is available *if* the state includes military-duty absence within its eligibility

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waiting period for AFDC eligibility for children deserted by one parent unless the remaining parent took earlier legal action to terminate the marriage. The opinion of the District Court, dated September 12, 1969, is unpublished. However, since the District Court in this case placed considerable reliance on the District Court decision in *Damico*, excerpts from the *Damico* decision are set forth in Appendix E attached hereto.

4. It should be noted that under the California regulation, military-duty absence, by itself, does not constitute "'continued absence'' which would trigger AFDC eligibility. However, if in conjunction with the military assignment, other factors, *e.g.*, a breakup of the marriage, develop, the child would then become eligibile to receive aid. California does consider other factors, but requires that there be something more than mere military-duty absence as the predicate for AFDC eligibility.

policy, but HEW requires only that 'within this interpretation [by HEW] of continued absence the state agency in developing its policy will find it necessary to *give consideration* to such situation as . . . service in the armed forces or other military service . . . .' HEW Handbook, Part IV, Sec. 3422.2 supra.

Therefore, HEW allows the State to go either way:

(1) To include servicemen; or

(2) To exclude servicemen.

California chose to exclude servicemen, and it was within its legal right to do so.

The serviceman category is a distinct and separate entity apart from the groups alluded to. Service people are transitory in nature and could pose a serious problem to the taxpayers of a state. For example, suppose the U.S. Army saw fit to move the majority or large numbers of its forces into the State of California, in said event the taxpayers of California would have to bear the additional costs of allowing AFDC grants, which could, and probably would, bankrupt the State. The HEW regulations gave the states a choice and the choice is a proper and legal one (some states have granted aid to the families of servicemen, others, along with California, have not). [Footnote omitted]

The Congress and HEW could have just as easily made *mandatory* inclusion of servicemen within the interpretation of continued absence from the home. They chose not to do so.

Some may feel that the exclusion of servicemen's children from AFDC eligibility may be a manifestation of unsound social policy, but the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws 'because they may be unwise, improvident or out of harmony with a particular school of thought.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). In this 'era of priorities' it is encumbent upon and the duty of states, in the utilization of its tax dollars, to be ever vigilant of the welfare of its *total* citizenry. In this case, the plight of the plaintiffs should be directed to the rightful source, the U.S.

> Government . . . to do otherwise would be in violation of the state's right to exercise its right of choice under the law. California has done nothing more than exercise its right of choice after having given decision to the categories of consideration as set forth in the HEW Regulations Sec. 3422.2."

The California regulation complies with the requirements of the Social Security Act and applicable HEW regulations.

II. In Determining "Military Orphans" to Be Ineligible to Receive AFDC Benefits, California Does Not Run Afoul of the Fourteenth Amendment.

The District Court has held that the Social Security Act must be interpreted as requiring California to grant AFDC benefits to children whose fathers are in the military because a contrary construction "would raise serious questions under the equal protection and due process clauses of the Constitution." Appendix A, p. A4, *infra*. This bootstrap argument is unsound because there are no Constitutional inhibitions against the exclusion of "military orphans" from AFDC benefits.

The District Court did not "reach the Constitutional arguments advanced herein, but . . . [found] them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California." District Court Opinion, Appendix A, p. A5, *infra*. It is submitted that appellees' Constitutional arguments are not compelling; indeed, they are totally without merit.

Appellees' equal protection argument as set forth in their Brief in Support of Motion for Preliminary Injunction is that "[t]he effect of California's military service exception is to create two classes of needy families indistinguishable

from each other except that one is composed of families in which the father is absent by virtue of his service in the Armed Forces, and the other is composed of families in which paternal absence stems from some other reason." They state that "it is difficult to imagine what basis the State could have for denying assistance to the needy families of absent servicemen when it grants the same assistance to the needy families of prisoners and deportees." Surely, the patently obvious differences between prisoners and deportees on the one hand and servicemen on the other could not be so misapprehended by the District Court, nor could those differences so completely elude appellees.

Remembering that Congress has premised AFDC eligibility on the absence of an expectation of relative economic security inuring from breadwinner to child (*King v. Smith, supra*), the rationality of excluding servicemen's children, but not prisoners' or deportees' children, is obvious. In the case of the serviceman, there simply is not the intra-familial dissociation of the type which emanates from the attendant stigmas of imprisonment or deportation of a father. And of course, the economic implications of imprisonment or deportation differ substantially from military induction or enlistment. An imprisoned father can offer no economic security to his family. And while a deported father may find employment in the country to which he is deported and choose to continue to support his family in this country, the expectation of either contingency occurring is slight. Moreover, there is no effective legal means to compel him to continue to support his family. In contrast, the serviceman suffers nothing even approaching the social ostracism of imprisonment or deportation. In addition, not only is he employed, but employed by the Federal government, and extensive military "allotment" procedures exist as a means

to "insure" that part of his pay ends up in the hands of his wife and children. See generally, U. S. Department of Defense "Military Pay and Allowances Entitlement Manual."

As District Judge Conti noted in his dissent: "The affidavits of the plaintiffs [appellees] which have been filed herein are poignant indictments of both the military pay scales and the efficiency of the military allotment procedures. However, those inadequacies do not trigger an AFDC eligibility . . . . [Appellees'] attacks should be on the military establishment rather than on the welfare administration of the State of California." Dissenting Opinion of Conti, D.J., Appendix A, p. A7, *infra*.

The dilemmas confronting appellees here are not unlike the predicament in which the plaintiffs found themselves in *Macias v. Richardson* (D.C.N.D. Cal., No. 50956, Jan. 5, 1970), *aff'd* 400 U.S. 913 (1970).[5] Just as the regulations in *Macias* drew a line between the unemployed and the underemployed, the California regulation here differentiates between the *unemployed imprisoned* father and the *underemployed serviceman* father, providing for AFDC eligibility of the families of the former, but not the latter. But the dilemmas posed by, and potential solutions for, underemployment are different from those for unemployment. And "[t]he constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 319 U.S. 141; 147 (1940). The AFDC program is not designed to aid families of *under*employed "breadwinners," *King v. Smith, supra;*

5. In *Macias*, the plaintiffs challenged the constitutionality of federal and California regulations in the AFDC-U program [the so-called "Unemployed Father" provisions of the AFDC law (see 42 U.S.C. § 607)] which imposed "arbitrary" cut-off points, in terms of the number of hours worked, in defining which fathers were "unemployed" and which were not. This Court approved the Congressional differentiation between the "unemployed and the underemployed" and upheld the regulations.

Macias v. Richardson, supra,[6] and the classifications drawn in the California regulation "are reasonable in light of . . . [the purposes of AFDC]." *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964). Appellants submit that the California regulation satisfies with ease the equal protection maxim that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

Yet, appellees have urged that the "traditional equal protection test" is inapplicable here and that rather, the more stringent "compelling state interest" test of *Shapiro v. Thompson,* 395 U.S. 618 (1969), must be applied. Appellees' argument is that one of the possible reasons for the California exclusion of "military orphans" from AFDC eligibility "is to discourage service in the military." They then urge such a purpose is invalid because it infringes on a "constitutional right" to serve in the military. It is suggested that this "right" is to be found in the penumbra of the Constitution along with the "right to travel" noted in *Shapiro v. Thompson, supra.*

In *Dandridge v. Williams,* 397 U.S. 471 (1970), this Court held that the ordinary "any reasonable basis" standard applies in testing social welfare laws under the Equal Protection Clause. In an obvious attempt to avoid the implications of that ruling, appellees have transposed the *duty* or "obligation of the citizen to render military service," *The Selective Service Draft Law Cases,* 245 U.S. 366, 378 (1918), into an imaginary *right* to military service. Moreover, even

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6. Certainly Congress could have included the underemployed within the purview of AFDC. Its failure to do so, however, does not invalidate the entire statutory scheme. Congress, as any legislative body, "may take one step at a time" and "select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955). And see *Developments in the Law: Equal Protection,* 82 Harv. L. Rev. 1065, 1084-87 (1969).

assuming the existence of such a "right," it is not being infringed by the California regulation. Unlike *Shapiro*, where the durational residence requirements imposed upon potential welfare recipients infringed *their* right to travel, here, it is not the "right" of the father to serve in the military that is at stake, but rather the claimed right of his dependents to receive AFDC. Thus a "compelling" state interest need not be shown. *Cf. McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 806-808 (1969). *Dandridge v. Williams, supra*, involved classifications affecting "the most basic economic needs of impoverished human beings." 397 U.S. at 485. Yet *Dandridge* applied the traditional "any conceivable state of facts" equal protection test, and the same must be done here. The California regulation passes that test.

Appellees also have asserted that the California regulation "is a denial of due process in that it embodies a conclusive presumption that a father who is absent from the home due to his military service is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational." What is wrong with appellees' assertion in this regard is that they have neglected to put quotation marks around the two words "continuously absent." Had they done so, "continuous absence" would correctly be denoted as the "words af art" that they are, deriving meaning only within the context in which they are used in the Social Security Act. See 42 U.S.C. § 606(a). Having done thus, the "presumption" of noneligibility of children of servicemen is neither arbitrary and capricious nor irrational. Rather, it is in conformity with the Congressional purposes underlying the AFDC program of providing assistance to families who lack a breadwinner. *King v. Smith*, 392 U.S. 309 (1968).

Stripped to its essentials, appellees' due process contentions represent little more than an expression of their view

that the exclusion of servicemen's children from AFDC eligibility manifests unsound social policy. However, the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co., supra,* 348 U.S. at 488. As this Court stated last term, "that era long ago passed into history. *Ferguson v. Skrupa,* 372 U.S. 726." *Dandridge v. Williams, supra,* 397 U.S. at 484-5.

CONCLUSION

It is submitted that the decision of the District Court misapprehends the requirements of the Fourteenth Amendment with the result that the court has interpreted the Social Security Act to impose mandatory eligibility requirements in the AFDC program which Congress did not intend. The result of the District Court's ruling is to view the Social Security Act as establishing a national welfare policy. This view of the federal Act is directly contrary to the long-standing administrative interpretations given it by the United States Department of Health, Education and Welfare. Instead of giving this authoritative interpretation the deference which it is properly due, *Cf. Lewis v. Martin,* 397 U.S. 552, 559 (1970), the District Court has ignored it. Appellants believe that the District Court has erred, that the questions presented by this appeal are substantial and that

they are of great nationwide, public importance. It is urged that probable jurisdiction be noted.

Dated: June 1, 1971.

Respectfully submitted,

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(Appendices Follow)

Appendix A

Majority and Dissenting Opinions Below

Original Filed Mar. 31, 1971
Clerk, U.S. Dist. Court
San Francisco

In the United States District Court for the Northern District of California

CASE NO. C-70 2273 ACW

ORDER GRANTING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DISSENTING OPINION OF JUDGE CONTI ATTACHED

NANCY REMILLARD, etc., et al., *Plaintiffs,*

vs.

ROBERT B. CARLESON, et al., *Defendants.*

BEFORE: HAMLIN, U. S. Circuit Judge; CONTI and WOLLENBERG, U. S. District Judges.

California participates in the federal aid to needy families program. 42 U.S.C. § 601 *et seq.* Part of this program gives aid to needy children who are "deprived of parental support or care by reason of the . . . continued absence from the home . . . of a parent".

Plaintiffs are mothers whose husbands are absent from home while on duty with the armed forces of the United States. Plaintiffs receive monthly allotment checks from the military, but such checks seldom if ever total more than

$150.00 per month.[1] The State does not contest that both plaintiffs, as well as many other military dependents, could easily demonstrate the "need" required by the statute cited above. The State does claim, however, that absence occcasioned by a father's military duties can never be "continued" within the meaning of 42 U.S.C. § 601. California Department of Social Welfare Regulation EAS section 42-350.1.[2]

Plaintiffs challenge this state-wide regulation on both statutory and constitutional grounds, and ask that the Court enjoin its enforcement. A three-Judge court was appointed. See *King v. Smith,* 392 U.S. 309 (1968) (note 3); and *Gilmore v. Lynch,* 400 F.2d 228 (1969). Memoranda were submitted, and by agreement of both parties, hearings on plaintiffs' motions for preliminary and final relief, as well as on defendants' motion for summary judgment, were consolidated. Said hearing being held, the matter was taken under submission.

The federal Act mandates that aid be given "with reasonable promptness to all eligible individuals". 42 U.S.C. § 602 (a) (10). An eligible child, within the present context, is one whose parent is absent from the home on a "continued"

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1. Plaintiff Joyce Dones, with two young children, and a baby soon to be born, receives $145.00 as her allotment from the Army. Prior to his induction, Mr. Dones earned approximately $600.00 per month in civilian employment. Plaintiff Nancy Remillard is the mother of one child. Her husband is an enlistee now serving in Vietnam; her allotment totals $130.60, which sum has often been delayed for considerable periods due to bureaucratic errors.

2. "'Continued absence' exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties [or] a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions. 'Continued absence' does not exist when one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services.'

basis, which absence deprives the child of support and care. The precise definition of "continued absence" rests with the States, but regulations of the Department of Health, Education and Welfare provide specific guidelines for this decision:

> "Within this interpretation of continued absence *the State* agency in developing its policy *will find it necessary to give consideration* to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, *service in the armed forces or other military service,* and imprisonment." HEW, Handbook of Public Assistance Administration § 3422.2 (emphasis added).

The key to the instant dispute is the phrase "will . . . give consideration to . . . ." In cases of a father's absence due to imprisonment, or temporary medical treatment, or parental separation, California considers each applicant's situation individually. There is no across-the-board exclusion of any of these categories listed in the HEW regulation.[3] But children of fathers absent on military orders get a different kind of "consideration". California claims that it has judged this group, *as a group,* and has decided it is to be deemed ineligible for § 606 payments.

This blanket exclusion of an entire group, specifically designated in the regulation as worthy of consideration, is reminiscent of California's one-time practice of conclusively presuming that informal parental separations did not result in "continued" absence until three months had passed. A three judge court of this circuit refused to find this all-

3. Counsel for the State was uncertain of California's policy as to persons employed away from home. The Court does not express any opinion as to the validity of the State's exclusion or inclusion of this group from §606 benefits.

encompassing declaration of ineligibility consistent with the policies behind § 606. The latter is designed for the sustenance of needy children. *King v. Smith,* 392 U.S. 309 (1968). The Court found that it might have been administratively convenient to "give consideration" to an entire group and thereby totally exclude it.

But the three judges found that such a device wrongly denied aid to many children who, if given individual consideration, would have been able to show a disruption of family support patterns every bit as grave as that caused in situations where the family breadwinner has been imprisoned or deported, and where § 606 payments are given. *Damico v. California,* No. 46538 (N.D. Calif. Sept. 12, 1969).

The State suggests that the real cause of plaintiffs' distress is not the absence of their spouses but is rather the inadequacy of military pay scales. "Cause" is a nebulous term which in this case may well encompass the factor of low pay. But it also includes the disruption caused by precipitately depriving a man of his civilian employment, assigning him to duty posts to which dependents may not accompany him, and making it necessary for the mother to rely on the tender mercies of the military allotment system. Congress, in its traditional solicitude for the soldier and his dependents, has shown a realization that military service represents, for many families, a disruption or dissociation as great as that envisaged by both HEW and California regulations.

In interpreting any statute, the courts will presume if at all possible that Congress would not act in a manner offending due process reasonability. The interpretation of § 606 urged by California would raise serious questions under the equal protection and due process clauses of the Constitution. All legislative classifications must be reasonable in light of

the goals of the statutory program of which they are a part. *Dandridge v. Williams,* 397 U.S. 471 (1970); *Developments in the Law: Equal Protection,* 82 Harv. L. Rev. 1067, 1077 *et seq.* It is difficult to see what legitimate goal is served by the classification here. California will give aid to the needy child of a prisoner whose term may be as little as ninety days. The state will also help the dependents of a divorced mother whose support payments from her absent husband are insufficient to meet basic needs. A parental spat may result in an informal separation of but a few weeks duration, but § 606 payments are available if dependent children are in want as a result thereof. But nothing is given to the needy child of a soldier who, often involuntarily, may remain away from home for as long as two years. This distinction might have been deemed rational at the time the AFDC program was instituted, when the armed services were composed of small numbers of long-term volunteers. It is doubtful whether it can pass muster today, when world tensions require the maintenance of large overseas contingents of draftees and non-career enlistees. See *Chastleton v. Sinclair,* 264 U.S. 543 (1924) (due process rationality to be judged in light of contemporary circumstances); and *People v. Belous,* 80 Cal. Rptr, ...(1970) (same). This court will not reach the constitutional arguments advanced herein, but it finds them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California.

The Court therefore declares that California may not deny benefits under 42 U.S.C. § 606 to otherwise eligible children by means of the conclusive presumption, embodied in the regulation cited above at note 2, that a parental absence is not "continued" if occasioned by service in the armed forces of the United States. Some military absences

may indeed be temporary; there comes to mind the situation posed by the career serviceman who *chooses* not to bring his family to a duty station. But other military absences give rise to the needs the statute was designed to fill. Each case must be considered in light of *all* relevant factors. *Damico v. California, cit. supra.*

Accordingly, IT IS HEREBY ORDERED that defendants herein are enjoined from enforcing California Department of Social Welfare Regulation EAS section 42-350.1 in a manner inconsistent with the declaration entered above. Execution of this Order is stayed for a period of ten days to allow the defendants to file notice of appeal if they so desire, except that the temporary restraining order hitherto issued shall remain in effect as to plaintiffs Dones and Remillard. Further stays of execution will only be considered upon timely application to the Court.

Dated: March ..., 1971

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ ALBERT C. WOLLENBERG
United States District
Judge

United States District Court
Northern District of California

No. C-70 2273 ACW

NANCY REMILLARD, et al.,
Plaintiffs,

vs.

ROBERT B. CARLESON, et al.,
Defendants.

BEFORE: HAMLIN, U. S. Circuit Judge;
CONTI and WOLLENBERG, U. S. District Judges.

CONTI, D. J.:

I dissent from the opinion of the majority.

This case involves the question of whether California may lawfully or constitutionally refuse to grant Aid to Families with Dependent Children (AFDC) benefits to needy families where the absence of a parent is due to his military service. This case does not involve the question of whether plaintiff's family is needy, as the family clearly falls within California's definition of what constitutes a needy family. The affidavits of the plaintiffs which have been filed herein are poignant indictments of both the military pay scales and the efficiency of the military allotment procedures. However, those inadequacies do not trigger an AFDC eligibility; their attacks should be on the military establishment rather than on the welfare administration of the State of California.

The question here presented is squarely one of the intent of Congress; the language of the statute and the

rights of States to make their own rules in accordance with the Act without legislation by the Federal Courts.

California participates in the Federal Government's AFDC program, which was established by the Social Security Act of 1935. The Act's purpose is to aid needy children who have been deprived of parental support or care by reason of the death, continued absence from the home, physical or mental incapacity of a parent. . .

The State of California, in order to receive Federal funds for the AFDC program, is required to submit a plan to the Secretary of Health, Education and Welfare (HEW). The plan must conform to the Social Security Act and to the regulations promulgated by HEW.

The legislative history of the original Social Security Act discloses an intention to leave considerable flexibility to the States in fashioning the eligibility standards to be applied in their AFDC programs. Thus, the committee reports, in discussing the prohibition in the Social Security Act, Sec. 402(b) of durational residence requirements in excess of one year, state:

> "The State may be more lenient than this, if it wishes. It may, furthermore, impose such other eligibility requirements—as to means, moral character, etc.—as it sees fit."
>
> H.R.Rep.No.615, 74th Cong., 1st Sess.24 (1935).
> S.Rep.No.628, 74th Cong., 1st Sess.35-36 (1935).

The Congressional debates shed light on another dimension of the same question. One element of the definition of "dependent child" in the original Sec. 406[1], as now, is that

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1. Sec. 406 when used in this title—
"(a) The term 'dependent child' means a child under the age of sixteen who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who

the child be living in the home of one of the relatives enumerated in the Act. However, it was clear the States might choose to exclude children living with certain of those relatives:

> "A State will not have to aid every child which it finds to be in need. Obviously, for many States, that would be too large a burden. It may limit aid to children living with their widowed mother, or it can include children without parents living with near relatives. The provisions are not for general relief of poor children but are designed to hold broken families together." 79 Cong.Rec.9269 (1935). (Remarks of Senator Harrison)

While there is no legislative history containing comparable statements with respect to age, (1) the intent to leave the description of eligibility to the States in the areas documented above and (2) the fact that the list of relatives and the age limit are dealt with in parallel fashion in the definition of "dependent child", support the conclusion that similar latitude was to remain available to States to impose lower age requirements. And there is *no* affirmative evidence to support an argument that age should be treated any differently from any other element of the definition.

The general intention of the Congress is indicated by the language contained, then and now, in Sec. 401 and corresponding sections of the other titles of the Act, that the purposes of the statute are directed to "enabling each State to furnish financial assistance, as far as practicable under the conditions in each State," to needy dependent children or the other designated groups.

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is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, in a place of residence maintained by one or more of such relatives as his or their own home;

(b) The term 'aid to dependent children' means money payments with respect to a dependent child or dependent children."

Whether a state would cover all those encompassed by the Federal matching definition depends on what, from the State's viewpoint, is practicable in the State, whether such coverage relates to an age limit or participation in a particular program, such as Aid to the Blind.

Further, it should be noted that the Congress did consider and legislate with respect to the matter of exclusions of dependent children from the program. Under Sec.402(b) the Department could not approve any plan which imposed a durational residence requirement of a year or more. This was done with the knowledge that many States were currently implementing, in their own relief programs, eligibility requirements which demanded residence far in excess of one year. In summary, the Congress directed approval of any State plan for Aid to Dependent Children which complied with the requirements of Sec.402(a), and did not contain any of the restrictions prohibited by Sec.402(b). Neither of these subsections dealt (nor does either currently deal) with the question of age limits below those adopted to delineate the bounds of Federal matching.

The statutory pattern of Title IV, part A, and its legal implications are repeated and reinforced in the other public assistance titles of the Social Security Act.

Title I of the Social Security Act[2], authorizes the Federal-State program for Old-Age Assistance. In the original act the statutory pattern of Title IV was followed in Title I. However, with respect to the aged, the Congress did not wish to give the States freedom to set eligibility requirements predicated upon age. Thus, while the Act defined "old-age assistance" (i.e., those payments by States which would earn Federal matching) as "money payments to aged individuals," Sec.2(b), (which corresponds to Sec.402

2. 42 U.S.C.301 et seq.

(b) in Title IV) prohibited approval of a plan which imposed an age requirement of more than 65.[3]

Similarly Title X[4], establishing the program of Aid to the Blind, shows a Congressional awareness of the issue of permitting an age limitation. Unlike the program of old-age assistance, Sec.1002(b) (corresponding to Secs.2(b) and 402(b)), which enumerated the limitations on eligibility, contained no provision relating to age. As is apparent from the legislative history of Title X, the Congress was aware of this omission. The Senate Report said:

> "The liberality of the eligibility requirements, which a State plan must contain, are worded in a similar fashion to paragraphs (2) and (3) of section 3(b) [pertaining to old age assistance plans]. These relate to residence and citizenship. In the State plan for aid to the blind no limitation is placed upon any age requirement which the State may impose."
> S.Rep.No.628, 74th Cong., 1 Sess.52 (1935).

Several conclusions follow logically from the foregoing:

(1) In 1935 Congress was aware of the possibility that States would impose conditions based on age as part of the eligibility requirements for the Federal-State public assistance programs;

(2) Congress legislated without ambiguity where it wished to express a policy in this regard (e.g., Old-Age Assistance); and

(3) The statutory provisions prohibiting exclusion (or requiring inclusion) of all members of a certain class were placed in Sections 2, 402, and 1002, the sections pertaining to State plans. Consequently the question of an individual's

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3. Except that until January 1, 1940, States were allowed to impose a requirement of 70 years.

4. 42 U.S.C. 1201 et seq.

eligibility yis-a-vis the State was never dealt with in the definitions contained in Sections 6, 406 and 1006, which only set forth the outer limits of Federal financial participation.

> Equitable treatment of individuals within a Congressionally-defined class requires reasonable classifications in light of the purposes of the Act and Section 406(a) may be relevant to the determination of reasonableness.

Although the States are given wide latitude to frame eligibility standards for their public assistance programs, their discretion is not absolute. States have always been limited by the enumeration of certain prohibited eligibility conditions discussed supra. In addition, since the earliest days of the administration of the Social Security Act, the states' freedom to fashion their programs has been circumscribed by what has come to be known as the (constitutional) doctrine of equitable treatment.

Soon after the enactment of the Social Security Act it became apparent that administrative interpretation would be necessary in order to preclude the States from making unreasonable classifications within their public assistance programs. The principle requiring that States provide equitable treatment of persons in like circumstances was formulated, based upon a principle of Constitutional law, the overall purpose and intent of the public assistance titles, the legislative history of the Act and individual plan requirements. This principle has been applied repeatedly over the past thirty-three years.

It has been applied by the Department to prohibit arbitrary exclusions of persons who come within the scope of the matching definition, where the criteria upon which the exclusion is based bear no reasonable relationship to the purposes or scheme of the Federal statute. For example the Department has consistently refused to allow States to

fashion their public assistance plans to exclude Indians or illegitimate children, as such. Since the criteria set out in the definitions in Section 406 are often indicative of the obectives of the program, they may have a bearing on the conclusion which the Department reaches concerning whether a particular State eligibility requirement results in equitable treatment.

Thus, while Section 406 enumerates various relatives with whom the needy child must be living, States are not required to include all such relatives within their implementing definition of "dependent child." It is clear that one of the original purposes of Title IV was to provide assistance to needy children living in homes in a family-like setting and it has not been considered inconsistent with equitable treatment for a State to exclude children who are living with relatives of the most distant degree of relationship enumerated in the statute.[5] Conversely, were a State to propose a definition of "dependent child" for purposes of its AFDC program which included children living with any of the enumerated relatives *except* the natural mother or father, such a proposal would be unacceptable to the Department. It would not violate any express provision of Title IV but clearly would be so contrary to one of the purposes of the statute as to be violative of equitable treatment.

Since a State may narrow the definition of "dependent child" for purposes of establishing criteria for its AFDC program, so long as it does not result in an unreasonable classification, the failure of a State to take advantage of a liberalization of the definition by the Congress is not considered unreasonable. In other words, if a State elects

5. Such a result is clearly supported by the remarks of Senator Harrison, supra, p.3.

to retain a classification that had, prior to an amendment to Title IV, set the outer bounds of Federal matching, that classification cannot be said to be inconsistent with the purposes of the Act since it represents a classification previously made by the Congress.

HEW interprets the "continued absence" requirement for "dependency" and AFDC eligibility in a fashion consistent with the above. HEW's interpretation of the continued absence requirement is set forth in Part IV of the Department's Handbook of Public Assistance Administration", which, in Section 3422.2 thereof provides as follows:

> "3422. *Continued Absence of the Parent from the Home.*
>
> 3422.2 *Interpretation.*—Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:
>
> 1. When the parent is out of the home;
> 2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
> 3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.
>
> A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent being counted on for support or care of the child. For example: the child's father has left home, without forewarning his family, and the mother really does

not know why he left home, nor when or whether he will return. Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service, and imprisonment."

It must be noted that the HEW interpretation is a strict one. The absence must be such as "to interrupt or to terminate the parent's functioning as a provider" and the "duration of the absence precludes counting on the parent's performance of his function." HEW gives as an example of the type situation falling within its interpretation the case where the father deserts the family and disappears. Thus, HEW treats the "continued absence" situation as something akin to death or incapacity, treating all three situations alike, requiring that dependency of a needy child arises only upon a serious and substantial destruction of the expectation of economic protection being available to a child from his parent.

It is clear since in Section 3422.2, HEW specifically defers to the states to determine whether as a matter of *state* policy, service in the armed forces will be treated as "continued absence." Under Section 3422.4 Federal financial participation is available *if* the state includes military-duty absence within its eligibility policy, but HEW requires only that "within this interpretation [by HEW] of continued absence the state agency in developing its policy will find it necessary to *give consideration* to such situations as . . . service in the armed forces or other military service . . . ." HEW Handbook, Part IV, Sec. 3422.2 supra.

Therefore, HEW allows the State to go either way:

(1) To include servicemen; or

(2) To exclude servicemen.

California chose to exclude servicemen, and it was within its legal right to do so.

The serviceman category is a distinct and separate entity apart from the groups alluded to. Service people are transitory in nature and could pose a serious problem to the taxpayers of a state. For example, suppose the U.S. Army saw fit to move the majority or large numbers of its forces into the State of California, in said event the taxpayers of California would have to bear the additional costs of allowing AFDC grants, which could, and probably would, bankrupt the State. The HEW regulations gave the states a choice and the choice is a proper and legal one (some states have granted aid to the families of servicemen, others, along with California, have not.[6]

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6. A State Survey submitted by plaintiffs in *Stoddard v. Fisher*, Civil No. 71-168 (S.D.Maine) which indicates:

(1) Twenty-two states give aid to all servicemen's families (Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Kansas, Massachusetts, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia);

(2) Twenty-one states give no aid to the families of servicemen (Alabama, Arkansas, California, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Puerto Rico, South Carolina, South Dakota, Texas, West Virginia, Wisconsin, Wyoming);

(3) Two states limit aid to the families of draftees (Idaho, Maine);

(4) Two states limit aid to the families of draftees or enlistees who have enlisted in order to avoid the draft (Iowa, Vermont);

(5) Five states did not participate in the survey (Kentucky, Nevada, Tennessee, Utah, Washington. Of these last five states, the Bureau of Social Science Research in Washington, D.C. has submitted to plaintiff information that Kentucky, Utah and Washington do grant AFDC to Military families. This brings the total number of states that do grant AFDC benefits to military families to twenty-five.

The Congress and HEW could have just as easily made *mandatory* inclusion of servicemen within the interpretation of continued absence from the home. They chose not to do so.

Some may feel that the exclusion of servicemen's children from AFDC eligibility may be a manifestation of unsound social policy, but the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws "because they may be unwise, improvident or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). In this "era of priorities" it is encumbent upon and the duty of states, in the utilization of its tax dollars, to be ever vigilant of the welfare of its *total* citizenry. In this case, the plight of the plaintiffs should be directed to the rightful source, the U.S. Government . . . . to do otherwise would be in violation of the state's right to exercise its right of choice under the law. California has done nothing more than exercise its right of choice after having given decision to the categories of consideration as set forth in the HEW Regulations Sec. 3422.2.

I would find that the California Department of Social Welfare Regulation EAS Sec.42-350 is constitutional, and that defendants are entitled, therefore, to a judgment in their favor as a matter of law.

Dated: March 26, 1971.

/s/ Samuel Conti
United States District Judge

Appendix B

Stay of Execution of Judgment Below

Original Filed Apr 13 1971
Clerk, U. S. Dist. Court
San Francisco

In the United States District Court for the Northern District of California

CASE NO. C-70 2273-ACW

NANCY REMILLARD, etc., et al., *Plaintiffs,*

vs.

ROBERT B. CARLESON, et al., *Defendants.*

STAY OF EXECUTION OF ORDER GRANTING INJUNCTIVE RELIEF

BEFORE: HAMLIN, U. S. Circuit Judge; CONTI and WOLLENBERG, U. S. District Judges.

Defendants having moved the Court to stay, pending appeal to the Supreme Court of the United States, the Order entered herein on March 31, 1971, enjoining enforcement of California Department of Social Welfare Regulation EAS section 42-350.1, and the Court having considered the papers in support of said motion and being fully advised in the premises,

IT IS HEREBY ORDERED that execution of the Order of March 31, 1971 enjoining enforcement of California Department of Social Welfare Regulation EAS section 42-350.1 be, and the same is, stayed until a decision is rendered herein by the Supreme Court of the United States.

The above granted stay shall not apply to plaintiffs Dones and Remillard, who shall continue to receive benefits under the Temporary Restraining Order issued hitherto.

Dated: April 13, 1971

/s/ OLIVER D. HAMLIN
United States Circuit Judge

/s/ ALBERT C. WOLLENBERG
United States District Judge

/s/ SAMUEL CONTI
United States District Judge

Appendix C

Notice of Appeal

Original Filed Apr 7 1971
Clerk, U. S. Dist. Court
San Francisco

United States District Court
Northern District of California

NO. C-70 2273 ACW

NANCY REMILLARD, etc., et al., *Plaintiffs,*

vs.

ROBERT B. CARLESON, et al., *Defendants.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that, pursuant to Title 28, United States Code section 1253, the above-named defendants hereby appeal to the Supreme Court of the United States from the Order Granting Declaratory Judgment and Injunctive Relief, entered herein on March 31, 1971, permanently enjoining said defendants from enforcing California Department of Social Welfare Regulation EAS Section 42-350.1.

DATED: April 6, 1971.

EVELLE J. YOUNGER,
Attorney General of the
State of California

/s/ JAY S. LINDERMAN
Deputy Attorney General

JOHN B. CLAUSEN,
Contra Costa County
Counsel

PAUL W. BAKER,
Deputy County Counsel

Attorneys for Defendants.

Appendix D

Statutes Involved

United States Code

42 U.S.C. § 601

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U.S.C. § 602(a)(10)

A State plan for aid and services to needy families with children must . . . provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.

42 U.S.C. § 606(a)

The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister,

stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment....

HEW, "Handbook of Public Assistance Administration," Part IV

3422. *Continued Absence of the Parent from the Home*

3422.2 *Interpretation*—Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:

1. When the parent is out of the home;
2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not

know why he left home, nor when or whether he will return.

Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service, and imprisonment.

California Department of Social Welfare, "Public Social Services Manual"

EAS 42-350 CONTINUED ABSENCE OF A PARENT

.1 *Definition of "Continued Absence"*

"Continued absence" exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties that deprives the child of at least one of its natural parents.

A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions.

"Continued absence" does not exist:

.11 When one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services.

.12 When both parents are maintaining a home together but the child lives elsewhere. It is immaterial whether the child lives with a relative or in foster care as a result of placement by the parents, by an agency acting on behalf of the parents, or by an authoritative agency.

.2 *Circumstances That Meet the Definition of "Continued Absence"*

The physical absence of a parent from the home in conjunction with any one of the following circumstances shall be considered to meet the definition of "continued absence":

.21 The parents are not married to each other and have not maintained a home together.

.22 The parent

.221 Is not legally able to return to the home because of confinement in a penal or correctional institution, or

.222 Has been deported, or

.223 Has voluntarily left the country because of the threat of, or the knowledge that he or she is subject to deportation.

.23 A parent has filed, or retained legal counsel for the purpose of filing an action for dissolution of marriage, for a judgment of nullity, or for legal separation.

.24 The court has issued an injunction forbidding the parent to visit the spouse or child.

.25 The remaining parent has presented a signed, written statement that the other parent has left the family and that dissociation within the definition of "continued absence" exists.

.26 Both parents are physically out of the home and their whereabouts are not known.

Appendix E

Excerpts From Memorandum Opinion and Order of United States District Court, Northern District of California, Entered on September 12, 1969, in Damico v. California, No. 46538

We find it unnecessary to reach the constitutional issues presented. We find the statutes and regulation in question plainly in conflict with the controlling federal statute and the primary purposes of the AFDC program.

Section 406(a) of the Social Security Act defines a "dependent child" as a "need child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . ." 42 U.S.C. § 606(a). This section was one of those interpreted in *King v. Smith,* 392 U.S. 309 (1968). The Supreme Court there held Albama's "substitute father" regulation under AFDC invalid as inconsistent with the Act. In reaching its decision, the Court undertook a full examination of the legislative history of the AFDC and the purposes of the program, and concluded that "Congress has determined that . . . protection of [dependent] children is the paramount goal of AFDC." 392 U.S. at 325. We must analyze the statutes challenged here in light of that paramount goal.

Reading §§ 11250(b) and 11254 together with regulation 42-311, the practical effect of the state scheme is to establish a rigid three-month waiting period for children deserted by one parent, unless the remaining parent takes legal action to terminate the marriage. These provisions have been strictly interpreted by the State Department of Social Welfare to deny claimants the opportunity to present any evidence regarding the "continued" nature of the absence of a parent, when the three-month requirement has not been met. *See* State Decision No. 27-30, Department of Social Welfare, February 23, 1968.

The federal statute contains no such rigid waiting period to establish a continued absence. Nor is such a provision found in the interpretation of the "continued absence" requirement by the Department of Health, Education and Welfare (HEW):

> 3422.2 Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:
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> 1. When the parent is out of the home;
> 2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
> 3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.
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> A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return.

HEW, Handbook of Public Assistance Administration, Pt. IV, § 3422.2 (1968).

The HEW interpretation recognizes that it is the nature of the absence under all the surrounding circumstances that determines whether the absence is "continued" as required by the statute. To say that, in the absence of legal action, no absence is "continued" until three months have elapsed is to deny aid to otherwise eligible needy children whose circumstances could clearly demonstrate an uninterrupted and non-temporary absence of a parent.

Furthermore, Regulation 42-311, in identifying factors defining continued absence, provides that if the parents separate without legal action, *deprivation* begins three months from the date of separation, while in case of separation with legal action, deprivation exists from the time the parent leaves the home. While the presence or absence of legal action may be one relevant factor in determining whether there is continued absence, it is completely irrelevant in determining whether there is deprivation; for that question must focus on the child, not on the legal status of the parents. By defining "deprivation" in such an arbitrary manner, the regulation clearly puts administrative convenience ahead of the welfare of the needy children. This is not permitted under the federal Act. *King v. Smith, supra.*

Defendants argue that the three month period is valid since it promotes a legitimate state objective in preventing fraud and collusion between parents for the purpose of obtaining welfare. A similar argument was rejected in *King v. Smith.* The Court there recognized the state's legitimate goal of preventing immorality and illegitimacy but held that the parent's wrongdoing should not be used to deprive the children of aid, since the state had other methods it could use to deal with such problems, 392 U.S. at 325-27. The same is true here. The state has many possible ways to check the reliability of information gathered from potential recipients, and thereby prevent fraud *ab initio.* It also may punish those who are subsequently found to have obtained benefits fraudulently. But it may not, consistently with the AFDC program, deny benefits to many eligible and needy children in order to avoid granting benefits to those few children whose parents have applied fraudulently.

Defendants further argue that the three-month waiting period furthers the legitimate state interest of keeping families together, since parents will be less likely to sepa-

rate if they know the children will have to wait three months for aid. This legitimate interest is clearly promoted by means impermissible under the federal Act, because it postulates deprivation of the children as the club to keep the parents together. Moreover, the argument does not focus on the crucial inquires which must be made: Are the children eligible and needy? Is the absence of the parent "continued"? Finally, it is not clear that the interest is even furthered by means of the waiting period. An affidavit submitted by an attorney in the Watts office of the Los Angeles Neighborhood Legal Services Society, Inc., indicates that of the over 600 divorce actions in that office alone in 1967, approximately 50% were filed simply to qualify the families for aid. A requirement that so encourages legal separation of the parents does not "help maintain and strengthen family life" as required by the federal statute. 42 U.S.C. § 601.

We hold that under the Social Security Act, the state may not deny AFDC benefits to otherwise eligible children by means of a conclusive presumption that an absence is not "continued" before the expiration of three months. In so ruling, we do not hold that the state may not set up a reasonable time period as a rebuttable evidentiary guide to determine what constitutes a "continued absence" in the absence of other factors. The state correctly argues that "continued absence" cannot be attained in an instant but must endure for some period. Conversely, however, the "continued" nature of the absence may be apparent, in an appropriate case, from the very early days of the separation. Protection of the needy children deprived by such an absence is required by the federal Act. We hold only that the Department of Social Welfare must, in passing upon an application for

Aid to Families with Dependent Children, consider *all* relevant factors in determining whether the particular absence is "continued."

The above determination makes it unnecessary to consider or pass upon the constitutional issues raised, and we express no opinion on their merits.